APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *HERB HALLMAN CHEVROLET, et al. v. DOROTHY NASH HOLMES, et al.* DATED JUNE 18, 1997, FILED JUNE 19, 1997 AND ENTERED JUNE 20, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-94-33-DWH(RAM)

HERB HALLMAN CHEVROLET, INC., et al.,

— Plaintiffs,

vs.

DOROTHY NASH HOLMES, et al.,

Defendants.

ORDER

Before the court are prevailing defendants' timely post-judgment motions (##'s 141 and 142) for attorney's fees pursuant to 42 U.S.C. § 1988. These motions, originally referred to the magistrate judge pursuant to 28 U.S.C. § 636, were resubmitted June 16, 1997, following the magistrate judge's recusal.

Pursuant to F.R.Civ.P. 54(d)(2)(B), where an appeal on the merits has been taken, the court either may rule on the motion or deny it without prejudice, directing a new period for filing after the appeal has been resolved. *See*, Advisory Committee Notes, 1993 Amendments to F.R.Civ.P. 54.

§ 1988 is a fee-shifting statute, authorizing the court in its discretion to assess the reasonable attorney's fees of the prevailing party to the losing party. It is settled law that the rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("(A) district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.") applies to § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 429, n. 2 (1983). However, for plaintiff's claims disposed of as of August 26, 1996, the analysis for frivolousness would be done better after plaintiff's appeal has been resolved. Accordingly, defendants' motions for those attorney's fees are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

As for defendants' attorney's fees incurred defending against the claims dismissed January 13, 1997 at plaintiff's request, there is no reason for delay. A decision whether those claims were frivolous will not be aided by the Ninth Circuit's ruling as to plaintiff's other claims. Defendants' motion must be supplemented, however. It does not tell when the work was done and what it was. Accordingly, defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

Appendix A

IT IS THEREFORE ORDERED that defendants' motions for attorney's fees incurred before August 26, 1996 are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

IT IS FURTHER ORDERED that defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

DATED: This 18th of June, 1997.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *JERRY VAN DER HOEVEN v. DONALD COPPA, et al.* DATED JUNE 18, 1997, FILED JUNE 19, 1997 AND ENTERED JUNE 23, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-95-90-DWH(RAM)

JERRY VAN DER HOEVEN,

Plaintiff,

vs.

DONALD COPPA, et al.,

Defendants.

ORDER

Before the court are prevailing defendants' timely post-judgment motions (##'s 112 and 112A) for attorney's fees pursuant to 42 U.S.C. § 1988. These motions, originally referred to the magistrate judge pursuant to 28 U.S.C. § 636, were resubmitted June 16, 1997, following the magistrate judge's recusal.

Pursuant to F.R.Civ.P. 54(d)(2)(B), where an appeal on the merits has been taken, the court either may rule on the motion or deny it without prejudice, directing a new period for filing after the appeal has been resolved. *See*, Advisory Committee Notes, 1993 Amendments to F.R.Civ.P. 54.

Appendix B

§ 1988 is a fee-shifting statute, authorizing the court in its discretion to assess the reasonable attorney's fees of the prevailing party to the losing party. It is settled law that the rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("(A) district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.") applies to § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 429, n. 2 (1983). However, for plaintiff's claims disposed of as of August 26, 1996, the analysis for frivolousness would be done better after plaintiff's appeal has been resolved. Accordingly, defendants' motions for those attorney's fees are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

As for defendants' attorney's fees incurred defending against the claims dismissed January 13, 1997 at plaintiff's request, there is no reason for delay. A decision whether those claims were frivolous will not be aided by the Ninth Circuit's ruling as to plaintiff's other claims. Defendants' motion must be supplemented, however. It does not tell when the work was done and what it was. Accordingly, defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

IT IS THEREFORE ORDERED that defendants' motions for attorney's fees incurred before August 26, 1996 are denied without prejudice, to be refiled within thirty days of the date the Ninth Circuit enters its judgment resolving plaintiffs' appeal.

IT IS FURTHER ORDERED that defendants shall file within fifteen days of the date of this order a supplement identifying the work done from August 26, 1996 through January 13, 1997 on the claims that were set for trial on January 21, 1997. Plaintiff will have fifteen days from the date the supplement is filed to oppose it. Defendants will have eleven days to reply.

DATED: This 18th day of June, 1997.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *HERB HALLMAN CHEVROLET, INC., et al. v. DOROTHY NASH-HOLMES, et al.* DATED AND FILED SEPTEMBER 25, 1997 AND ENTERED SEPTEMBER 29, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-94-33-DWH(RAM)

HERB HALLMAN CHEVROLET, INC., et al.,

Plaintiffs,

vs.

DOROTHY NASH-HOLMES, et al.,

Defendants.

ORDER

Before the court are defendants' renewed motions (#s 159, 162, 164) for attorney's fees under 42 U.S.C. § 1988 as prevailing defendants as to three claims ("defamation-plus", custom and policy and illegally retained property) brought under 42 U.S.C. § 1983 and voluntarily dismissed with prejudice[1] by plaintiffs on the eve of trial. After final

1. Plaintiffs dismissed all supplemental claims as well. These were claims Fifth through Eighth of the eight claim amended complaint.

judgment (#139) was entered in favor of defendants, they moved (#s 141, 142) for attorney's fees as to the whole case, including on claims as to which summary judgment had earlier been granted (# 85). Because the summary judgment was appealed following final judgment, the court (# 158) deferred until after resolution of that appeal the attorney's fees motion as to those claims, but entertained the attorney's fees request for work on the § 1983 claims plaintiffs voluntarily dismissed with prejudice on January 13, 1997. The motions (#s 141, 142), therefore, were denied without prejudice to the extent they sought fees for work on claims under appeal and the defendants were asked (# 158) identify only the work done between August 26, 1997 and January 13, 1997, on the § 1983 claims plaintiffs voluntarily had dismissed with prejudice. In response to the court's order (# 158), defendants have moved (#s 159, 162, 164) for those attorney's fees.

Plaintiffs' reply (# 163) does not place in dispute the reasonableness of either the work done by defendants' attorneys or the hourly rates applied. By this plaintiffs have conceded the lodestar[2] of this fee determination. On this record, the court finds Washoe County required 43.75 hours of the time of the Washoe County District Attorney's office and the other defendants were billed 381.5 hours by their attorneys for legal services on those claims during that period. These attorney hours reasonably were required by

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2. A word now universally applied to the product of reasonable hours multiplied by a reasonable hourly rate, first given this meaning in *Lindy Bros. Bldrs. Inc. of Philadelphia v. American Radiation & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).

these defendants. The court also finds that $140.00 per hour for these services is a reasonable rate, if a bit low.

42 U.S.C. § 1988 authorizes attorney's fees to a prevailing defendant only if the plaintiff's claim was frivolous, unreasonable, vexatious or groundless *ab initio*, or if the plaintiff continued to litigate after the claim clearly became so. See *Schutts v. Bently Nevada Corporation*, 1997 WL 321780 (D.Nev.). In other words, if any or all of the claims plaintiff voluntarily dismissed with prejudice were "meritless in the sense [of] groundless or without foundation," *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), or if "the plaintiff continued to litigate after it clearly became so," *Id.*, at 15 (quoting from *Christiansburg*[3] with approval), then assessing to plaintiff his opponent's attorney's fees is authorized. A court may grant attorney's fees to a defendant under § 1988 only under these limited circumstances, however. See *Maag v. Wessler*, 993 F.2d 718, 719 (9th Cir. 1993); *Nevada Entertainment Ind. v. City of Henderson*, 8 F.3d 1348, 1352 (9th Cir. 1993) ("prevailing defendants in civil rights actions are awarded attorneys fees only in 'exceptional cases.' "). This is such a case.

The Claims

The three claims in question (defamation-plus, custom or policy, and illegal retention of seized property) actually relate to the first three and the fifth claims out of eight alleged in the last seven pages of the thirty-nine page amended

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3. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

complaint (# 5). The amended complaint contained in all 104 (CIV) Roman numbered paragraphs. Before reaching the claims, however, a reader must wade through thirty-two pages containing seventy-seven paragraphs of often vague and imprecise factual allegations, suggesting the product is more the drafter's legal fancy than the report of the party. Each of these paragraphs is incorporated into every claim, and each claim is incorporated into the claim which follows it.

As a practical matter, claims six, seven and eight (the supplemental claims other than defamation), and claim three (for declaratory and injunctive relief) received no measurable attention from the attorneys on either side after August 26, 1996. The court finds the time spent by defendants' counsel from then until January 13, 1997, was focused on claims one, two, four and five (conspiratorial deprivation of constitutional rights, custom and policy, personal liability and defamation, respectively) as they related to what was left of those claims after order # 85,[4] *viz.*, defamation-plus, custom and policy, and illegal retention of property.

Plaintiffs' defamation claim (claim five) contains only three paragraphs (XCIII, XCIV and XCV). The first incorporates into the claim "paragraphs I-XCII herein as if

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4. Order # 85 ruled that the district attorney defendants had absolute immunity on plaintiffs' 1983 claims after July 8, 1992, except claims of defamation-plus and illegal retention of seized property granted summary judgment in accordance with that ruling, and also granted summary judgment to defendants on the second claim, also except for defamation-plus and retention of seized property claim.

fully set forth at this point." *Id.* The second consists entirely of the following sentence:

> Defendants made or caused to be made false and defamatory statements of and concerning plaintiffs to third persons, negligently and with actual malice, causing the aforementioned damages. *Id.*

The third paragraph alleges entitlement to punitive damages. No defamatory statement is identified in the fourth claim, leaving the reader to sift through the sixty-five incorporated factual allegations looking for one.

Plaintiffs' custom or policy claim (claim two) consists of two paragraphs (LXXXIII and LXXXIV). The first incorporates all preceding paragraphs and the second merely alleges employee responsible for establishing policy for the City of Reno and Washoe County sanctioned conduct amounting to violations of constitutional rights of plaintiffs.

Plaintiffs' illegal retention of property claim is not alleged in any numbered claim, but it perhaps can be inferred from the allegations in the first and fourth claims (deprivations of constitutional rights) *if* facts concerning such retention can be found in one the seventy-seven factual allegation paragraphs incorporated into the first claim. None can, unless paragraph LI is an adequate allegation of fact, a matter which, it will be seen, is mooted by plaintiffs' tacit abandonment of this claim.

Appendix C

Discussion

Custom and Policy Liability of Washoe County
(plaintiffs' second claim)

After the court's August 26, 1996, order (# 85), the defendants again moved (#s 114, 115) for summary judgment. Plaintiffs opposed (#s 123, 129) and defendants replied (#s 130, 131). Defendant Washoe County urges now (# 153) that plaintiffs did not produce (F.R.Civ.P 56(e)) evidence giving rise to a genuine issue of material fact for trial on the existence of a custom or policy of Washoe County to violate anyone's constitutional rights under any theory of plaintiffs' complaint.

While Washoe County cannot be liable on a *respondeat superior* theory under § 1983, it can be liable where a plaintiff's constitutional rights were violated as a result of an official county policy. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). A county employee with final decisionmaking power on the issue in question may by her actions and decisions be found to have made such a policy. *Id.*

Plaintiffs responded (# 123) to the county's motion with an apparently contrived play on words. At the deposition of defendant district attorney, plaintiffs' counsel inserted the word "policy" into a question thus: "Does your policy concerning contacts with the media apply to this document?" The answer given was: "My policy concerns deputies' contacts with the media. Obviously the District Attorney often comments on things in addition to that." Plaintiffs'

counsel did not pursue the matter further. On the basis of *this answer only*, given the day before plaintiffs' filed this opposition (#123), plaintiffs argue Washoe County was liable under § 1983 for whatever defamatory statement the district attorney might happen to make. This claim is plainly frivolous. Because plaintiffs point to nothing else in support of their custom and policy claim, it was probably frivolous when filed, but certainly frivolous after August 26, 1996.

The Retention of Property Claim

By their complaint plaintiffs alleged:

> Plaintiffs are informed and believe, and thereon aver, that Defendants ultimately obtained and retained custody and control of some or all of the documents and other items seized pursuant to the search warrants, and continue to hold the lion's share of these items to this day. These records are business records needed by Plaintiffs to conduct day-to-day business. Amended complaint (# 5), paragraph LI.

When defendant Washoe County moved (# 114) for summary judgment on this claim, plaintiffs' response (# 123) abandoned it. Their opposition (# 152) to the attorney's fees motions does not explain this abandonment of the claim, or even mention it. From all of this the court finds the information and belief allegations of paragraph LI to be mere contrivance; this claim was frivolous when filed.

Appendix C

Defendant Washoe County will be awarded its attorney's fees as requested under 42 U.S.C. § 1988 for the period August 26, 1996 to January 13, 1997.

Washoe County also asks for attorneys' fees under 28 U.S.C. § 1927. Such an award would require a finding plaintiffs' counsel has acted so recklessly or in bad faith in the matter of these claims as to constitute a willful abuse of the judicial process. *Kanarek v. Hatch*, 827 F.2d 1389, 1391 (9th Cir. 1987). On the record before it, the court declines to do so.

The Defamation-plus Claim Against the Remaining Defendants

The claims plaintiffs voluntarily dismissed are the supplemental claims, including defamation, and the three § 1983 claims: "defamation-plus"; custom and policy liability; and illegally retained property. As discussed above, the last two were or have become frivolous. Because § 1988 is unconcerned with supplemental claims, frivolous or not, all that remains for discussion is the defamation-plus claim.

To establish a *prima facie* case of defamation in Nevada, a plaintiff must prove:

(1) a false and defamatory statement by defendant concerning the plaintiff;

(2) an unprivileged publication to a third person;

(3) fault, amounting to at least negligence; and

(4) actual or presumed damages.

Chowdhry v. NLVH, INC., 109 Nev.478, 483 (1993) (citing RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

Defamation, alone, by a public official is not actionable under 42 U.S.C. § 1983. *Paul v. Davis,* 424 U.S. 693, 700-02 (1976). To state a "defamation-plus" claim, something which is actionable under § 1983, plaintiff "must join a defamation claim to a recognizable section 1983 wrong. . . ." *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir. 1992) (en banc); *Cooper v. Dupnik,* 924 F.2d 1520, 1532 (9th Cir. 1991) ("To state a claim for defamation under section 1983, a plaintiff must allege loss of a recognizable property or liberty interest in connection with the allegation of injury to reputation.") Thus, mere injury either to reputation or business goodwill is insufficient to support a defamation-plus § 1983 claim, unless these are shown under State law to be legally protected interests, rather than merely the basis for tort claims. *Id.* at 1533-34. Nothing in plaintiffs' papers (#s 123, 129, 152) makes this showing. For this reason, deciding whether plaintiffs' *State* defamation claim is frivolous would be an empty exercise; § 1988 is not implicated.

On the record before it, the court finds plaintiffs' "defamation-plus" claim to be frivolous.

Accordingly, **IT IS ORDERED** that defendants' renewed motions (# 159, 162, 164) for attorney's fees are GRANTED, except that defendant Washoe County's motion

for 28 U.S.C. § 1927 attorney's fees is DENIED; defendants' original motions (#s 141, 142) for attorney's fees are DENIED as moot, without prejudice to their timely renewal after determination of the appeal. Defendant Washoe County shall recover from plaintiffs attorney's fees in the sum of $6,125.00; the other defendants shall recover from plaintiffs their attorney's fees in the sum of $53,410.00. Let judgment be entered accordingly.

DATED: This 25th day of September, 1997.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN *JERRY VAN DER HOEVEN, et al. v. DONALD COPPA, et al.* DATED AND FILED SEPTEMBER 25, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-95-90-DWH(RAM)

JERRY VAN DER HOEVEN, et al.,

Plaintiffs,

vs.

DONALD COPPA, et al.,

Defendants.

ORDER

Before the court are defendants' renewed motions (#s 129, 130, 132) for attorney's fees under 42 U.S.C. § 1988 as prevailing defendants as to three claims ("defamation-plus", custom and policy and illegally retained property) brought under 42 U.S.C. § 1983 and voluntarily dismissed with prejudice[1] by plaintiffs on the eve of trial. After final judgment (#111) was entered in favor of defendants, they moved (#s 112, 112A) for attorney's fees as to the whole case, including on claims as to which summary judgment

1. Plaintiffs dismissed all supplemental claims as well. These were claims Fourth through Tenth of the ten claim complaint.

had earlier been granted (# 56). Because the summary judgment was appealed following final judgment, the court (# 128) deferred until after resolution of that appeal the attorney's fees motion as to those claims, but entertained the attorney's fees request for work on the § 1983 claims plaintiffs voluntarily dismissed with prejudice on January 13, 1997. The motions (#s 112, 112A), therefore, were denied without prejudice to the extent they sought fees for work on claims under appeal and the defendants were asked (# 128) identify only the work done between August 26, 1997 and January 13, 1997, on the § 1983 claims plaintiffs voluntarily had dismissed with prejudice. In response to the court's order (# 128), defendants have moved (#s 129, 130, 132) for those attorney's fees.

Plaintiffs' reply (# 131) does not place in dispute the reasonableness of either the work done by defendants' attorneys or the hourly rates applied. By this plaintiffs have conceded the lodestar[2] of this fee determination. On this record, the court finds Washoe County required 30.75 hours of the time of the Washoe County District Attorney's office and the other defendants were billed 52.75 hours by their attorneys for legal services on those claims during that period. These attorney hours reasonably were required by these defendants. The court also finds that $130.00 per hour for these services is a reasonable rate, if a bit low.

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2. A word now universally applied to the product of reasonable hours multiplied by a reasonable hourly rate, first given this meaning in *Lindy Bros. Bldrs. Inc., of Philadelphia v. American Radiation & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).

Appendix D

42 U.S.C. § 1988 authorizes attorney's fees to a prevailing defendant only if the plaintiff's claim was frivolous, unreasonable, vexatious or groundless *ab initio*, or if the plaintiff continued to litigate after the claim clearly became so. See *Schutts v. Bently Nevada Corporation*, 1997 WL 321780 (D.Nev.). In other words, if any or all of the claims plaintiff voluntarily dismissed with prejudice were "meritless in the sense [of] groundless or without foundation," *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), or if "the plaintiff continued to litigate after it clearly became so," *Id.*, at 15 quoting from *Christiansburg*[3] with approval), then assessing to plaintiff his opponent's attorney's fees is authorized. A court may grant attorney's fees to a defendant under § 1988 only under these limited circumstances, however. See *Maag v. Wessler*, 993 F.2d 718, 719 (9th Cir. 1993); *Nevada Entertainment Ind. v. City of Henderson*, 8 F.3d 1348, 1352 (9th Cir. 1993) ("prevailing defendants in civil rights actions are awarded attorneys fees only in 'exceptional cases.' "). This is such a case.

The Claims

The three claims in question (defamation-plus, custom or policy, and illegal retention of seized property) actually relate to the first four "claims" out of ten set forth on the last seven pages of the thirty-eight page complaint (# 1). The complaint contained in all ninety-nine (XCIX) Roman numbered paragraphs. Before reaching the claims, however, a reader must wade through thirty pages containing sixty-six

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3. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

paragraphs of often vague and imprecise factual allegations, suggesting the product is more the drafter's legal fancy than the report of the party. Each of these paragraphs is incorporated into every claim, and each claim is incorporated into the claim which follows it.

As a practical matter, claims five through ten (the supplemental claims other than defamation) received no measurable attention from the attorneys on either side after August 26, 1996. The court finds the time spent by defendants' counsel from then until January 13, 1997, was focused on claims one through four (conspiratorial deprivation of constitutional rights, custom and policy, personal liability and defamation, respectively) as they related to what was left of those claims after orders #33[4] and #56,[5] *viz.*, defamation-plus, custom and policy, and illegal retention of property.

Plaintiffs' defamation claim (claim four) contains only three paragraphs (LXXIX, LXXX and LXXXI). The first incorporates into the claim "paragraphs I-LXXVIII herein

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4. Order # 33 ruled that because plaintiffs filed their complaint on February 10, 1995, any claims accruing before February 10, 1993, were barred by the statute of limitations. NRS 11.190(4)(e).

5. Order # 56 ruled that the district attorney defendants had absolute immunity on plaintiffs' § 1983 claims after July 8, 1992, except claims of defamation-plus and illegal retention of seized property, granted summary judgment in accordance with that ruling, and also granted summary judgment to defendants on the second claim, also except for defamation-plus and retention of seized property claims.

as if fully set forth at this point." *Id.* The second consists entirely of the following sentence:

> Defendants made or caused to be made false and defamatory statements of and concerning plaintiffs to third persons, negligently and with actual malice, causing the aforementioned damages. *Id.*

The third paragraph alleges entitlement to punitive damages. No defamatory statement is identified in the fourth claim, leaving the reader to sift through the sixty-six incorporated factual allegations looking for one.

Plaintiffs' custom or policy claim (claim two) consists of two paragraphs (LXXII and LXXIII). The first incorporates all preceding paragraphs and the second merely alleges employees responsible for establishing policy for the City of Reno and Washoe County sanctioned conduct amounting to violations of constitutional rights of plaintiffs.

Plaintiffs' illegal retention of property claim is not alleged in any numbered claim, but it perhaps can be inferred from the allegations in the first claim (deprivations of constitutional rights, including rights under the Fourteenth Amendment) *if* facts concerning such retention can be found in one the sixty-five factual allegation paragraphs incorporated into the first claim. None can, unless paragraph XLIX is an adequate allegation of fact, a matter which, it will be seen, is mooted by plaintiffs' tacit abandonment of this claim.

Appendix D

Discussion

Custom and Policy Liability of Washoe County
(plaintiffs' second claim)

After the court's August 26, 1996, order (# 56), the defendants again moved (#s 87, 88) for summary judgment. Plaintiffs opposed (#s 96, 101) and defendants replied (#s 102, 103). Defendant Washoe County urges now (# 122) that plaintiffs did not produce (F.R.Civ.P. 56(e)) evidence giving rise to a genuine issue of material fact for trial on the existence of a custom or policy of Washoe County to violate anyone's constitutional rights under any theory of plaintiffs' complaint.

While Washoe County cannot be liable on a *respondeat superior* theory under § 1983, it can be liable where a plaintiff's constitutional rights were violated as a result of an official county policy. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). A county employee with final decision-making power on the issue in question may by her actions and decisions be found to have made such a policy. *Id.*

Plaintiffs responded (# 96) to the county's motion with an apparently contrived play on words. At the deposition of defendant district attorney, plaintiffs' counsel inserted the word "policy" into a question thus: "Does your policy concerning contacts with the media apply to this document?" The answer given was: "My policy concerns deputies' contacts with the media. Obviously the District Attorney often comments on things in addition to that." Plaintiffs'

counsel did not pursue the matter further. On the basis of *this answer only*, given the day before plaintiffs' filed this opposition (# 96), plaintiffs argue Washoe County was liable under § 1983 for whatever defamatory statement the district attorney might happen to make. This claim is plainly frivolous. Because plaintiffs point to nothing else in support of their custom and policy claim, it was probably frivolous when filed, but certainly frivolous after August 26, 1996.

The Retention of Property Claim

By their complaint plaintiffs alleged:

> Plaintiffs are informed and believe, and thereon aver, that Defendants ultimately obtained and retained custody and control of some or all of the documents and other items seized pursuant to the search warrants, and continue to hold the lion's share of these items to this day, despite dismissal of criminal charges against Plaintiffs.

Complaint (# 1), Paragraph XLIX.

When defendant Washoe County moved (# 87) for summary judgment on this claim, plaintiffs' response (# 96) did not oppose it. Nor does their opposition (# 120) to the attorney's fees motions explain this tacit abandonment of the claim, or even mention it. From all of this the court finds the information and belief allegations of paragraph XLIX to be mere contrivance; this claim was frivolous when filed,

Appendix D

Defendant Washoe County will be awarded its attorney's fees as requested under 42 U.S.C. § 1988 for the period August 26, 1996 to January 13, 1997.

Washoe County also asks for attorneys' fees under 28 U.S.C. § 1927. Such an award would require a finding plaintiffs' counsel has acted so recklessly or in bad faith in the matter of these claims as to constitute a willful abuse of the judicial process. *Kanarek v. Hatch*, 827 F.2d 1389, 1391 (9th Cir. 1987). On the record before it, the court declines to do so.

The Defamation-plus Claim Against the Remaining Defendants

The claims plaintiffs voluntarily dismissed are the seven supplemental claims, including defamation, and the three § 1983 claims: "defamation-plus"; custom and policy liability; and illegally retained property. As discussed above, the last two were or have become frivolous. Because § 1988 is unconcerned with supplemental claims, frivolous or not, all that remains for discussion is the defamation-plus claim.

To establish a *prima facie* case of defamation in Nevada, a plaintiff must prove:

(1) a false and defamatory statement by defendant concerning the plaintiff;

(2) an unprivileged publication to a third person;

(3) fault, amounting to at least negligence; and

(4) actual or presumed damages.

Chowdhry v. NLVH, Inc., 109 Nev.478, 483 (1993) (citing RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

Defamation, alone, by a public official is not actionable under 42 U.S.C. § 1983. *Paul v. Davis*, 424 U.S. 693, 700-02 (1976). To state a "defamation-plus" claim, something which is actionable under § 1983, plaintiff "must join a defamation claim to a recognizable section 1983 wrong. . . ." *Buckey v. County of Los Angeles*, 968 F.2d 791, 795 (9th Cir. 1992) (en banc); *Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991) ("To state a claim for defamation under section 1983, a plaintiff must allege loss of a recognizable property or liberty interest in connection with the allegation of injury to reputation."). Thus, mere injury either to reputation or business goodwill is insufficient to support a defamation-plus § 1983 claim, unless these are shown under State law to be legally protected interests, rather than merely the basis for tort claims. *Id.* at 1533-34. Nothing in plaintiffs' papers (#s 96, 101, 131) makes this showing. For this reason, deciding whether plaintiffs' *State* defamation claim is frivolous would be an empty exercise; § 1988 is not implicated.

On the record before it, the court finds plaintiffs' "defamation-plus" claim to be frivolous.

Accordingly, **IT IS ORDERED** that defendants' renewed motions (# 129, 130, 132) for attorney's fees are GRANTED, except that defendant Washoe County's motion

for 28 U.S.C. § 1927 motion for attorney's fees is DENIED; defendants' original motions (#s 112, 112A) for attorney's fees are DENIED as moot, without prejudice to their timely renewal after determination of the appeal. Defendant Washoe County shall recover from plaintiffs attorney's fees in the sum of $3,997.50; the other defendants shall recover from plaintiffs their attorney's fees in the sum of $6,857.50. Let judgment be entered accordingly.

DATED: This 25th day of September, 1997.

s/ [illegible]
UNITED STATES DISTRICT
JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 29, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-15275
D.C. No. CV-94-00333-DWH

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,

Plaintiffs-Appellants,

v.

DOROTHY NASH-HOLMES; et al.,

Defendants-Appellees.

No. 97-15323
D.C. No. CV-95-00090-DWH

JERRY VAN DER HOEVEN; et al.,

Plaintiffs-Appellants,

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,

Defendants-Appellees.

Appendix E

No. 97-16960
D.C. No. CV-95-00090-DWH

JERRY VAN DER HOEVEN; et al.,

Plaintiffs-Appellants,

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,

Defendants-Appellees.

No. 97-16976
D.C. No. CV-94-00333-DWH

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,

Plaintiffs-Appellants,

v.

DOROTHY NASH-HOLMES; et al.,

Defendants-Appellees.

ORDER

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges

Appellees' petition for rehearing is denied.